FILE COPY.

Office Supreme Court U. S.
FILED
MAY 21 1906
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

THE STATE OF MISSOURI,
Complainant,
vs.
THE STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO,
Defendants.

No. 4 ORIGINAL.

Suggestions of Complainant in Opposition to Motion for Allowance and Taxation of Costs.

HERBERT S. HADLEY,
Attorney-General of Missouri.

CHAS. W. BATES,
City Counselor of City of St. Louis,
for Complainant.

SAM B. JEFFRIES,
Of Counsel.

J. W. Steele & Co., Prs., 18 N. Third, St. Louis.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

THE STATE OF MISSOURI, *Complainant,* vs. THE STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, *Defendants.*	No. 4 ORIGINAL.

Suggestions of Complainant in Opposition to Motion for Allowance and Taxation of Costs.

Now comes complainant in the above entitled case and submits to the court that the motion of defendant, The Sanitary District of Chicago, to tax as costs in its behalf herein against complainant certain sums paid out and expended by it on account of the trial and submission of said cause should be overruled, which said items so moved to be taxed as costs against complainant by said defendant are as follows:

First, $5,650.00 paid Frank S. Bright, special commissioner, in accordance with the order of the court.

Second, $3,776.37 for the taking down in shorthand and transcribing of testimony of defendant's witnesses and supplying the same to the commissioner.

Third, $866.00, solicitor's fees, being the amount provided for by the statute, to-wit: $20.00 for attendance at final hearing, and $2.50 for each deposition taken.

The total amount so requested by defendant to be taxed against complainant as costs, amounting to $10,292.37.

And complainant in opposing the taxing of said sums as costs against it in said cause submits to the court:

First, that the bill herein was filed by complainant in this court against the defendants, State of Illinois, and The Sanitary District of Chicago, in good faith, believing that from the recent experiences of sanitarians great injury and damage would be inflicted upon its people on account of the opening and maintenance of the Chicago drainage canal receiving and conveying into the Mississippi River at St. Louis the sewage from the City of Chicago; and the evidence in the cause is sufficient to justify complainant's apprehension and fear of great danger on account of the construction and operation of said canal, and that it was complainant's public duty to its own citizens, and to the science of sanitation, that the question be submitted to the proper judicial tribunal for a competent determination as to the effect of the operation of said canal upon complainant's citizens; that complainant was advised by reputable sanitarians to the effect that opening the said canal would cause great, permanent and irreparable injury to complainant unless defendant, The Sanitary District of Chicago, be enjoined from discharging its raw sewage into said canal.

Second, that complainant did not ask or pray for a judgment sounding in damages, but that defendants be enjoined from the operation of said canal, the same being deemed necessary by complainant in order to protect the health and comfort of its citizens; that unless said bill had been filed and said cause determined the condition of the public mind in complainant's State would have continuously been in an aroused conditon and at all times apprehensive of great and serious damage to the health and comfort of complainant's citizens; that defendants would at all times have been subject to a continuous apprehension of damage caused by them to the citizens of complainant and likewise apprehensive of

future equitable proceedings, looking toward their enjoinment of the further operation of said canal.

Third, that the controversy involved in said suit is similar in kind to questions involving boundary lines between states, wherein no pecuniary or otherwise financial interests subject to determination are in question, and wherein this court has uniformly held that the costs of the litigation should be divided equally between the parties.

Fourth, that the two states, to wit: Missouri and Illinois, appeared before this court in this proceeding in their sovereign capacities and as such under the common law are not expected to pay costs, and therefore not expected to ask payment for costs expended by them.

Fifth, because as shown by the testimony of reputable witnesses learned in the science of sanitation great damage and injury to complainant was apprehended, in the event of the opening of the canal; which complainant had a right to and did depend and rely upon, without any authority or power, save through the mandate of this court, to prevent the construction, operation and maintenance of said canal; that complainant was in no wise responsible for the construction of said canal, or the creation of the apprehension on the part of its people of the injury and injustice to be suffered by them, if any, on account thereof.

Sixth, that it was and is of as much importance and interest to defendants that said bill be filed, and the questions therein at issue be correctly determined by the mandate of this court, as it was and is to the complainant, and that defendants have been greatly benefited, from a financial point of view in the further construction, operation and maintenance of said canal, by reason of the decree rendered by this court herein.

Seventh, that complainant in the prosecution of this suit

to judgment has been compelled to pay as costs in its own behalf large sums of money as follows:

$5,650 to Frank S. Bright, special commissioner herein, in accordance with the previous order of the court;

$2,500 to Frank S. Bright, for supervising the printing of the record under and in accordance with the order of the court;

Not less than $3,450 for the taking down in shorthand and transcribing the testimony of complainant's witnesses and supplying same to said commissioner;

$12,205.89 for printing record and reproducing the exhibits introduced in evidence in the cause;

All of which is shown by the sworn statement hereto attached, and made a part hereof.

In support of the foregoing suggestions it is submitted that the alleged items of cost should not be imposed upon complainant.

The order appointing the special commissioner was entered in accordance with the stipulations of the parties herein filed on the 10th day of November, 1902, which provides, among other things, as follows:

> "One-half of the compensation and expenses of the commissioner shall be advanced by the plaintiff and one-half by the defendant, The Sanitary District of Chicago, and each side shall pay such fees to its witnesses as may be necessary to secure their attendance, but not exceeding the fees allowed by law in such cases, the costs of the case to be taxed by the court on the final disposal of the case, to be paid in such manner as the court may at that time determine."

There is no act of Congress expressly conferring power upon this court, in cases of original jurisdiction, to award

costs against either of the parties. We do not, however, assume the position that in the absence of such statute it is not within the power of the court to tax the costs in equity cases of original jurisdiction in such manner as it may deem proper under the circumstances of each case.

As was said in the case of State of Pennsylvania vs. Wheeling & Belmont Bridge Company, 18 How. 460,

> "—and when the Constitution of the United States conferred that jurisdiction on this court, it cannot be construed to exclude the power, possessed and consequently exercised by every court of equity then known, to use its discretion to award or refuse costs, as its judgment of the right of the case in that particular might require. The court entertains no doubt of its power to award costs and deny the application to file a bill of review."

Doubtless Congress, in its failure to enact legislation fixing the costs that shall be imposed upon the respective parties litigant, deemed it wise to leave that question entirely with the court, leaving to it the right to exercise its own good judgment as good conscience and justice might in each particular case dictate.

As was said again in Pennsylvania vs. Wheeling & Belmont Bridge Company, supra.

> "Original jurisdiction in equity in a particular class of cases, conferred by the Constitution on this court, has been interpreted to impose the duty of adjudication according to such rules and principles as governed the action of the Court of Chancery in England, which administered equity at the time of the emigration of our ancestors, and down to the period when our Constitution was formed."

From the foregoing it will be observed that while Con-

gress has failed to speak upon the subject, this court acts within the jurisdiction of equity practice in all cases of original jurisdiction in equity, in conformity with the rules and practice of equity courts at common law long prior to and at the time of the adjudication of our Federal Constitution.

In original cases involving disputed boundary lines between states it has always been the rule of this court either to require the states litigant to bear their respective costs or to equalize the same by requiring each state to pay one-half thereof. Such was the order of this court in the case of Indiana vs. Kentucky, 167 U. S. 274, wherein the following language is used:

> "It is further ordered, adjudged and decreed that the compensation of commissioners and expenses attendant upon the discharge of their duties in permanently marking said line as directed by the decree of May 18th, 1906, be and the same are hereby allowed at the sum of $1,122 in accordance with their report and that said charges and expenses and the costs of this suit to be taxed be equally divided between the parties hereto."

In Indiana vs. Kentucky, 163 U. S. 520, an original proceeding in this court regarding a controversy as to the boundary line between the two states expressed in the title, the court made the following order:

> "It is further ordered, adjudged and decreed that the compensation and expenses of the commissioners and the expenses attendant on the discharge of their duties up to this time be and they are hereby allowed * * * and that said charges and expenses, and the costs of this suit, to be taxed, be equally divided between the parties."

In Missouri vs. Iowa, 165 U. S., l. c. 144, which likewise

was a controversy involving the boundary line between said states the court ordered as follows:

> "That the compensation and expenses of commissioners and the expenditures attendant upon the discharge of their duties be and the same are hereby allowed at the sum of $5,273.56 in accordance with their report as confirmed as aforesaid, and that charges and expenses with the costs of this suit to be taxed be equally divided between the parties hereto."

Again in Misouri vs. Iowa, 160 U. S. 688, the court ordered that the costs, including not exceeding $10.00 per day for each commissioner and the other costs incidental to the making and establishment of the boundary line should be paid by the States of Missouri and Iowa equally.

The evident reason of the court in adjudging an equal division of the costs in cases involving disputed boundary lines has been that there was no actual pecuniary or financial interest accruing to either of the states, and that they appeared in the Supreme Court of the United States as the only tribunal having jurisdiction over such controversies, and in such appearance represented their respective sovereignties.

In the case of Pennsylvania vs. Wheeling & Belmont Bridge Company, supra, the court calls attention to the fact that its jurisdiction is to some extent concurrent with the circuit courts, but that its exclusive jurisdiction extends only to few cases such as regard the sovereign character of the party to the suit, or in cases where the interests of our foreign relations may be concerned, and where principles of international law are involved.

Complainant contends that following out the natural trend of the decisions of this court, upon cases where states become litigant in their sovereign capacity, the question of

costs should not be considered or carried into judgment, further than to allow and require an equal division of the same.

Under the common law in cases of this character where sovereign rights were involved, and according to the English rule as it seems to have been adopted by this court in the case of Pennsylvania vs. Wheeling & Belmont Bridge Co., supra, it is said to be beneath the dignity of a sovereign to demand costs, and that therefore when it is successful in a suit its counsel will waive all claim for costs.

Foster's Federal Practice, Third Edition, Sec. 327.

There is no reason why the old common law rule should not be applied in cases of this character—in fact if it is not applicable here we know of no instance in which it may be. It is true our courts have qualified the rule in such cases as were made necessary on account of the adoption of recent statutes, allowing fees and costs in certain instances, and in order to harmonize the rule and render effective the statutes on this subject the rule has been departed from to some extent.

Quoting from 1 Daniel Ch. Pr., side page 13:

> "It has been said that as the King, by reason of his prerogative, does not pay costs to his subjects, so it is beneath his dignity to receive them."

Now, while it was held in the case of United States vs. Sanborn, 135 U. S. 271, that the judgment of the circuit court refusing to allow costs should be reversed and judgment therefor granted in favor of the United States, yet the theory of the court in arriving at its conclusion was not in that case such as will conflict with the common law principle heretofore enunciated, nor will in any wise conflict

with the right of the court to say to the parties in this cause that inasmuch as they appear in their sovereign capacity no costs can be recovered from them in the event they be unsuccessful; and that coming into this court in their sovereign capacity as the one tribunal with jurisdiction to right or adjust their grievances, and, inasmuch as there is no power to compel them to pay costs other than through the mandate of this court, it is beneath their dignity to accept costs in the event of their being successful.

There seems to be no rule in this court directly applicable to cases involving the court's original jurisdiction. The rules cited by defendant, and set forth in its suggestions in support of the motion, have reference to the practice governing inferior federal courts. So that this court is free to act, so far as previous rules or statutes are concerned, and to exercise its judgment and discretion in determining whether or not the costs in question should be paid by the complainant. Even though the rules referred to by defendants are made applicable to cases of original jurisdiction in this court, their terms are not such as to prevent the court from exercising its discretion in taxing the costs as it may determine according to good conscience and justice.

The Supreme Court of the United States is the arbiter of controversies between states, as in questions of boundaries, and its rules, practice and proceedings will be moulded to bring them to final hearing on their real merits.

Florida vs. Georgia, 17 How. 478.
Missouri vs. Iowa, 7 How. 660.
Alabama vs. Georgia, 23 How. 505.
Virginia vs. W. Va., 11 Wall. 39.
Rhode Island vs. Massachusetts, 12 Pet. 657.

Claim is made that complainant should pay a $2.50 attorney's fee on account of the deposition of each witness tes-

tifying in the cause. This claim is based upon the provisions of Sec. 824, Revised Statutes of the United States, relative to the taxing of costs and fees, which, in particular, provides as follows:

> "For each deposition taken and admitted in evidence in a cause, $2.50."

Complainant contends that inasmuch as the testimony in this cause was taken before a special commissioner appointed by the court, the evidence came direct to the court from the commissioner, and in strict legal parlance no depositions were taken and that the section of the statute referred to has no application to cases of this character or to testimony taken in this manner.

We have been unable to discover a direct ruling of this court upon the question at hand; but referring to the rulings of those courts where the question is more likely to arise, and which seem to have reached the proper interpretation of this statute, we call the court's attention to the case of Strauss vs. Meyer, 22 Fed. Rep. 267. The question involved arose upon a motion to retax costs because of the allowance of an attorney's fee of $2.50 for each witness examined before the examiner appointed to take testimony, and for each witness examined before the master, to ascertain damages sustained by complainant.

Judge Treat in his opinion said:

> "The party is not entitled to counsel fees for witnesses called before the master, and I doubt whether he is entitled to fees for witnesses called before this special examiner. Testimony taken before a special examiner is not in the nature of depositions taken at different places where a party may be compelled to go,

and I will allow nothing of the kind. I think it is outside of the fee bill and outside of the reason of it. The party has to appear and conduct the case before the special examiner who is appointed therefor, and to charge fees for the witnesses called before the special examiner is outside of the rules on taking depositions. If such depositions were taken elsewhere than before the special examiner then you are entitled to $2.50 for each witness."

The foregoing seems to have been the rule adopted by the circuit courts, and, while it is a strict construction of the statutes, it is nevertheless the proper construction, for the reason that costs as a general rule are on account of statutory enactments, there being no common law rule which would entitle or justify one in claiming attorney's fees for the examination of witnesses.

Giving the statute a strict construction, it appears that no such costs can accrue unless the deposition of witnesses be taken under the formalities of depositions at common law, and has reference solely to depositions so taken, or such as are taken under the terms of some statutory provision governing the same.

Inasmuch as this court in the taxation of costs in original equity suits is not governed by the provisions of statutes, and is called upon by the authority of common law of long standing prior to the formation of the government to make such disposition of the costs as in its judgment and good conscience the case may demand, we respectfully submit that, upon a proper consideration of the equities involved, the rights of the parties litigant, and the benefits derived by them by reason of the litigation in question, the complainant should not be required to pay any portion of the items alleged by defendants to have been paid out upon

their behalf as costs. The prosecution of the suit was necessary in order to meet the demand of the conflicting opinions of men learned in the science of sanitation, and to appease the public mind. The complainant had to apprehend an injury on the part of defendants and to establish by mandate of this court that defendants might continue in the operation of the canal; and as a result of the mandate, defendants are at the present time free from all fear of disturbance in its successful operation, by an appeal to the courts on the part of complainant for equitable relief, from apprehended danger.

It was not because complainant desired to impose a burden upon defendants that this suit was instituted, but because of a firm belief that injury to it would result from the nuisance complained of. Complainant was in duty bound, in the protection of the life and comfort of its citizens, to institute proceedings and prosecute the same to final judgment. The benefit derived from the litigation belongs to defendants. The canal can now be continued in operation without fear of further equitable proceedings. Complainant did not ask for substantial monetary damages, in fact if such damages existed, as alleged in the bill, there was no exact way to determine the same. The proceeding was an equitable one and conducted to all intents and purposes as a friendly suit, both parties having but one object in view, that being to determine the exact effect of the operation of the canal upon the water of the Mississippi River below the mouth of the Illinois.

What we have said in this connection with reference to this litigation is also true with reference to suits involving disputed boundary lines.

Upon a proper consideration of the foregoing we feel

justified in asking the court to forego the taxing of said costs against complainant.

Respectfully submitted,

HERBERT S. HADLEY,
Attorney-General of Missouri.

CHAS. W. BATES,
City Counselor of City of St. Louis,
for Complainant.

SAM B. JEFFRIES,
Of Counsel.

STATE OF MISSOURI,
CITY OF ST. LOUIS. } ss.

Sam B. Jeffries, being duly sworn, on his oath states that at the time of the filing of the bill in the case of the State of Missouri vs. State of Illinois and The Sanitary District of Chicago in the Supreme Court of the United States, he was Assistant Attorney-General of the complainant, the State of Missouri, and that, from said date until the month of January, 1905, he occupied said office and was well acquainted with the filing of said bill and this prosecution by complainant in said court; that after retiring from said office he was retained as special counsel in said cause by the complainant State, and since said time has been cognizant of every transaction transpiring in connection with said case. That he knows of his own personal knowledge that complainant caused to be paid on its behalf five thousand six hundred and fifty dollars ($5,650) to Frank S. Bright, a special commissioner in said cause, in accordance with the order of the court previously made, and that to his personal knowledge complainant caused to be paid, for and in its behalf, for stenographic services for taking down in shorthand and transcribing complainant's testimony and rebuttal testimony, in said cause, not less than the sum of thirty-four hundred and fifty dollars ($3,450); and that complainant paid and caused to be paid, on account of the printing of testimony in said cause and reproducing the exhibits introduced in evidence, the sum of twelve thousand two hundred and five and $^{89}/_{100}$ dollars ($12,205.89), all of which was necessary, in

order that the orders of the court made in said cause might be fully executed, and said court might have all of the testimony before it in its consideration of the issues of fact and of law therein involved.

And further deponent saith not.

SAM B. JEFFRIES.

Subscribed and sworn to before me, this 19th day of May, 1906.

FRANKLIN MILLER,
Notary Public.

My commission expires the 24th day of June, 1907.